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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-109

HAL FRANCIS RACHAL and EDWARD BARHAM HUNNICUTT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF

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Respondent erroneously assumes that the records involved in the direct appeal are the only records involved in these Section 2255 Motions.

The Trial Court made no such finding. A cursory reading of the original transcript would show that there were others. As a matter of fact, *Respondent's Memorandum* filed in the trial court in opposition to the 2255 motions acknowledges such fact when it states:

> "The original Stock Journal has not been produced to this date."

Petitioners stand ready to prove that *all* missing records would have been available at the trial, but for the unreasonable pre-indictment delay by the Securities and Exchange Commission.

The one case cited by Respondent deals with repeated 2255 motions. The trial court did not base its order on *res judicata* and the courts have uniformly held that *res judicata* does not apply to a collateral attack on the original judgment of convicition and sentence. *Heflin v. U.S.*, 358 U.S. 415, 420.

Respondent's Supplemental Response filed in the trial court in opposition to the 2255 Motions states:

> "There is nothing in the record to indicate that Petioners ever asked for a stipulation as to what the testimony of the witness who died would have been."

Such Supplementary Response made no objection to the allegation in Petitioners' Motions, thus waiving any possible objection. Also the trial court's Order states:

> "Nothing is pointed to in the record to indicate that any effort was ever made between Petitioners and the Government to stipulate what the testimony of such witness would have been, which leaves the Court completely in the dark as to the nature of any information supposedly possessed by such witness, or its relevancy, or other facts which demonstrate its supposed materiality."

Now, for the first time, Respondent takes exception to the allegation in Petitioners' Motions, thus giving Petitioner no opportunity to amend their petitions.

A denial, thus based, would not be on the merits. It would merely be a ruling that Petitioners' pleadings were deficient. *Sanders v. U.S.*, 373 U.S. 1, 19.

Respectfully submitted,

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